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Supreme Court, U.S.
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No. 95-970

In The

Supreme Court of the United States

October Term, 1995

ROBERT A. MERCER, JR.,

Petitioner,

v.

JASON MONZACK, ESQ.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF

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I. The Split In Authority Between the First Circuit as to *Mercer v. Monzack*, 53 F.3d 1 and *Matter of Kazi*, 98 F.2d 318, 320 (7th Cir. 1993) Whereby the First Circuit Excuses Failure to Make a Timely Rule 4003(b) Objection Thereby Legitimizing the Lower Court's Proscribed Time-Barred Adjudication on Merit of Debtor Exemptions While the Seventh Circuit Strictly Prohibits Any Such Adjudication Where a Timely Rule 4003(b) Objection is Not Made – The Split in Authority is Clear

In his brief in opposition to petition for certiorari, respondent views the First Circuit opinion in *Mercer v. Monzack*, 53 F.3d 1 at 3 as constituting a waiver of Bankruptcy Rule 4003(b) by the debtor because debtor Mercer " . . . plainly listed discrete statutory citations supporting the various exemption claims, thereby restricting both the focus of the exemptions and the description of the particular right or interest in property of the estate to which the claims applied." Thus, in the First Circuit's and respondent's view contrary to *Taylor v. Freeland & Kronz*, 112 S.Ct. 1644 (1992) and ***without providing any legal authority*** respondent asserts that debtor/petitioner essentially waived his 11 USC 522(l) rights (operative because of respondent's failure to make a Rule 4003(b) objection) to exempt the entire settlement by granting the bankruptcy court authority to adjudicate on the merit of the indicated exemptions even though the seventh circuit in the *Matter of Kazi*, 98 F.2d 318, 320 (7th Cir. 1993) ruled "Failure to file a timely objection ***is an absolute bar*** to consideration of the merit of exemptions." (Emphasis added). Though it is clear *In Re Mercer*, 158 B.R. 886, 889 (Bkrtcy. D.R.I. 1993) that proscribed adjudication on the merit of debtor exemptions did occur, respondent argues that the bankruptcy court allocated the settlement, hitherto unallocated, and thus as such the intent of the settlement was

known and uncontested throughout the proceedings. This falsehood is the basis for respondent asserting that that debtor/petitioner ***intended*** to 100% exempt the settlement as contrasted with petitioner's claim that Debtor clearly ***did 100% exempt*** the settlement on the amended B-4 schedule (see Petition for Writ of Certiorari, page 4 – what Debtor did exempt is clear on amended B-4 petition). Respondent thus argues that what debtor intended to exempt was not part of the estate.[1] "After the hearing, the Bankruptcy Court found as fact, that no portion of the personal injury settlement was on payment for a disability or for loss of future earnings." (respondent opposition brief, page 8). Though respondent thus admits to the proscribed adjudication occurring, he infers the bankruptcy court adjudication as determining the intent of the unallocated sum when there is nothing to substantiate that *In Re Mercer, Id.* since the bankruptcy court simply evaluated the merit of exemptions and approved or denied them on that basis. The appeal courts, it was not the bankruptcy court, then assumed that if there was no

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[1] See *In Re Davis*, 118 B.R. 272, 276, ftn. # 3 (W.D.Pa. 1990, rvrs'd.), is Bankruptcy Court opinion in *Taylor*, how Debtor Davis's characterization of the principle exempted asset (an allocated sum) ultimately was determined to be, as Debtor Davis claimed because no rule 4003(b) objection was filed, as loss of future earnings ***despite*** the existent allocation that case conflicting with that characterization. In the instant case, Debtor Mercer was denied his characterization of the unallocated settlement being for disability or loss of future earnings where an unallocated sum did not contradict Mercer (as in *Taylor*) and no Rule 4003(b) objection to Mercer's assertion that the settlement was for those items.

basis for permanent disability the unallocated settlement was therefore not for permanent disability.[2]

Respondent argues that there is no split of authority between the First Circuit in *Mercer v. Monzack*, 53 F.3d 1, and *Matter of Kazi*, 98 F.2d 318 (7th Cir. 1993). Contrast the First Circuit's "facially valid" argument as excusatory basis for respondent not having to make a Rule 4003(b) objection along with the clear and apparent adjudication on merit of exemptions that occurred by the bankruptcy court with *Kazi's* strict prohibition where no rule 4003(b) objection is made, as in the instant case, to any such adjudication: "Failure to file a timely objection is an absolute bar to consideration of the merit of exemptions." *Id.* at 320. The First Circuit, for the first time at the appellate level, in the instant case now allows bankruptcy court jurisdiction to adjudicate and ultimately deny Debtor exemptions (where it is uncontested no Rule 4003(b) objection was made) past the Rule 4003(b) bar date excusing henceforth any failure to make a Rule 4003(b) objection. In the *Matter of Salzar*, 52 F.3d 708 (7th Cir. 1995) the Seventh Circuit recently reaffirmed the *Kazi* prohibition against any such adjudication. Can the split in authority between the First and Seventh Circuit be any more clear?

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[2] It is uncontested respondent/trustee failed to make a rule 4003(b) objection to debtor/petitioner's 100% exempt claim of the $50,000 insurance recovery within the thirty days allowed – "The trustee did not object to the debtor's claim of exempt property as the exemptions stated by the debtors are allowed by the bankruptcy code," appellee brief, USCA, page 6. The thirty day Rule 4003(b) bar date expired 9/26/91. The bankruptcy court opinion, *In Re Mercer*, 158 B.R. 886 (Bkrtcy. D.R.I. 1993), in which proscribed adjudication on merits of debtor exemptions irrefutably occurred resulting ultimately in denial of permanent disability exemption and loss of future earnings exemption was dated 9/16/93, nearly two years past the Rule 4003(b) bar date.

II. The Lower Courts and Respondent Cannot Sensibly Utilize Conclusions of the Bankruptcy Court Rendered 9/16/93 as to Proscribed Adjudication on Merit of Debtor Exemptions Two Years After the Rule 4003(b) Bar Date as Excusatory Basis for Failure Two Years Earlier to Make a Rule 4003(b) Objection – Trustee Clearly Could Not Have Known Then What He Knows Now as to Merit of Debtor Exemptions

With the knowledge available to trustee and the courts after proscribed adjudication on the merits occurs resulting in conclusions such as exemptions are meritless or, as found not to be permanently disabled, therefore disability claim not part of estate any party in interest can now skirt the Rule 4003(b) strict requirements retroactively, as in the instant case, by postulating that at the time of the thirty day Rule 4003(b) bar date expiration (9/26/91 the instant case) trustee did not object for reasons derived from bankruptcy court proscribed adjudication on merit of exemptions years later. Sensibly, it is extremely easy to see that Rule 4003(b) objection provisions never were intended to arm trustee retroactively with results of time barred merit hearings years later in postulating excusatory basis for failure to make same Rule 4003(b) objection. ***Trustee must make his Rule 4003(b) objection based solely on his perceived merit of exemptions during the time period dictated by bankruptcy law – only thirty days after exemption schedules are filed – not up to multiple years later.*** Any Court can retroactively with such time barred information years later provide the semblance of a reasonable excusatory basis for failure to make a Rule 4003(b) objection and the First Circuit and Respondent have followed that unfair course exactly in the instant case.

III. The Exemption Schedule Themselves Put The Trustee on Notice, No Other "Red Flag" is Currently Required by Bankruptcy Law Despite Respondent's and Lower Court's Rationale as to Any Such Inferred Requirement

Trustee/respondent use of the verbiage in his brief in opposition of *putting the trustee on notice* (page 7, respondent brief in opposition) is not tied, as it should be, to the B-3 and B-4 exemption schedules trustee is required to examine for perceived merit during the thirty day objection period but instead to some visceral "red flag" that trustee/respondent asserts without substantive legal authority to back the claim he believes the debtor is bound to wave in trustee's face whenever debtor has a significant exempt claim. Only when debtor has waved the red flag in the manner required by respondent is respondent, in his view, duty bound to make a Rule 4003(b) objection or, if no such objection is made, 11 USC 522(l) will take effect making whatever Debtor claimed as exempt is exempt. In *Taylor v. Freeland & Kronz*, 938 F.2d 420 at 425 (3rd Cir. 1991, affrm'd. S.Ct.) it is clear that the burden is not on Debtor to wave a red flag but on trustee to carefully examine the exemption schedules: " . . . Congress intended to shift the burden of objection from the debtor to other parties in interest." Trustee/respondent was remiss at carefully reviewing petitioner's schedules and even failed to ignore prior to the bar date petitioner's letter dated 7/25/91 advising trustee Debtor would be amending schedules to 100% exempt the then pending settlement (*See* appellant's Petition for Writ of Certiorari, page 3 – if a red flag is required clearly Debtor did with the 7/25/91 letter wave such a flag in trustee's face). The "red flag" argument critical to the lower courts

excusatory view of the otherwise strict Rule 4003(b) *Taylor* dictated objection requirements is based on the *Shoemaker* case – *Shoemaker,* 155 B.R. 552 (Bankr. N.D. Ala. 1992). It is the only case that flies in the face of *Taylor* in requiring Debtor to bear the burden of notice and conveying that notice to trustee that debtor when making a substantive exempt claim per the B-3 and B-4 exemption schedules ***that that in itself is not a red flag enough[3] to draw attention of trustee into making at Rule 4003(b) objection,*** trustee therefore, in not being required to object, reserving right to adjudicate indefinitely at a later date on that exempt claim. The First Circuit's view that petitioner's exemptions are " . . . facially valid . . . " *Id.* at 2, is their indication that the simple listing of exemptions even though they may reference the asset as being 100% exempt, "100% exempt" is not enough of a "red flag" and failure to make a Rule 4003(b) objection for the first time at the appellate level is excused, thereby removing virtually any responsibility of trustee to even examine the exemption schedules henceforth.

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[3] Something other than a perceived lack of merit for listed exemption, as respondent's argument goes, is required to call attention to trustee of the need for a potential Rule 4003(b) objection.

IV. Petitioner's Permanent Disability Claim for 100% of Settlement per 11 USC 522(d)(10)(C) was Ruled by Bankruptcy Judge Votolato Two Years After the Rule 4003(b) Bar Date to Not Be Part of The Bankruptcy Estate (i.e. – Therefore Debtor Ostensibly Cannot Make Such an Exempt Claim) Trustee is Obviated From Now Using that Court Conclusion as Excusatory Basis for His Failure to Make a Rule 4003(b) Objection Over Four Years Ago During the Thirty Day Rule 4003(b) Objection Period Ending 9/26/91

Respondent claims the wording in *Kazi* by debtor on schedules as to the exempt claim "if said property is property of the estate", *Id.* at 322, constitute his required red flag (the Rule 4003(b) objection in that case was also not made by trustee). By asserting that the conditional clause constitutes a red flag, respondent incorrectly draws a parallel between the *Kazi* case and the First Circuit in the instant case. The fact that the purported red flag in *Kazi* was not dispositive (and therefore inconsequential for purposes of respondent's argument) is aptly put by Judge Crabb, Chief District Judge (sitting by designation): "The time limitation in Rule 4003(b) relates to the list of exemptions claimed by the debtor rather than the substantive determination whether certain property is actually property of the estate." "The bankruptcy court held and the district court affirmed that the trustee had a duty to file objections to debtor's exemptions within the 30 days regardless whether such exemptions may be characterized as "conditional". We agree." *Id.* at 320. Sensibly, it would appear that petitioner's use of the "100%" under exempt amount column would be an adequate red flag though the accurate definition of such a warning flag remains smoked in obfuscation and mystery by the lower courts and respondent in the instant case who use the undefined term to their advantage.

In his statement of the case (brief in opposition) respondent " . . . contends that the Court of Appeals correctly held that the debtor did not properly list the entire personal injury proceeds so as to invoke the privileges that he would otherwise enjoy by virtue of the Trustee's failure to file a Rule 4003 objection." What, in respondent's view or in the view of the lower courts the instant case, ***does*** invoke Rule 4003(b), particularly in that case law strictly supports, other than the instant case to supplant Supreme Court precedent of *Taylor*, that ***no*** exceptions be made for failure to make a Rule 4003(b) objection?[4] (In *Kazi* the debtor's conditional " . . . if said property is property of the estate . . . ", *Id.* at 322, was ruled as not excusatory for the failure to make a Rule 4003(b) objection and is therefore not a legitimate red flag). The lower courts expediently view, for Rule 4003(b) objection purposes, whether the listed exemptions are correct in nomenclature only (*see* appellant Petition for Writ of Certiorari, page 10) ***without regard for the intended focus of Rule 4003(b) objection provisions being an evaluation by potential objector as to perceived merit of listed exemptions.*** Then the same courts proceed to deny same exemptions for lack of merit as if Rule 4003(b) and 11 USC 522(l) did not exist. Bankruptcy Judge Votolato's decision the instant case indicates that debtor is only entitled to that portion of the settlement attributed to each exemption to the extent that Debtor is ruled to be permanently disabled and has loss of earnings – the court found Debtor not permanently disabled and having no loss of future earnings. But, *Taylor* requires that the Court

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[4] "The statute and rule establish a strict procedure for objections to claimed exemptions. Their import is clear and they admit of no exception." *Taylor v. Freeland & Kronz*, 938 F.2d 420, 423 (3rd Cir. 1991, affrm'd. S.Ct.)

accept without adjudication as to the merit of Debtor/petitioner's exemption that he is disabled because of the Rule 4003(b) default, trustee forever barred from convening a Rule 4003(c) hearing to contest that claim. That is the privilege, to utilize respondent's use of the word albeit correctly, afforded petitioner by the failure of trustee to make a Rule 4003(b) objection in combination with Debtor controlling the unallocated sum as being for a permanent disability (or loss of future earnings) in the same manner as in *Taylor* Debtor Davis did (see above herein). Both these "privileges" flow directly from the respondent's failure to make a rule 4003(b) objection triggering 11 USC 522(l) as becoming operative granting Debtor as exempt whatever debtor claimed as exempt.

V. While Trustee Claims There Was Nothing to Object To as The Exemptions Claimed by Debtor Are Allowed by Law (Ignoring the Clear Intent of Rule 4003(b) Objection Provisions to Evaluate Perceived Merit of Debtor Exemptions) He Is Obviated By Such Rhetoric From Now Claiming Such Lawful Exemptions As Not in Good Faith

As an argument of last resort, respondent relies on 11 USC 105(a) that petitioner has not claimed exemptions in good faith so the court has authority on that basis to set aside the exemptions. Respondent is captive of his own rhetoric as having characterized Debtor exemptions as good faith as evidenced by respondent's statement. "The trustee did not object to the Debtors claim of exempt property as the exemptions claimed by the debtor ***are allowed by the bankruptcy code.***" (Emphasis added), appellee brief, USCA, page 6. Thus, as the exemptions are allowed by the code, they are good faith exemptions.

CONCLUSION

Petitioner respectfully requests that certiorari be granted as respondent and the lower courts have failed to provide a workable "bright line"[5] rule in the place of *Taylor, Taylor* effectively supplanted by the First Circuit. Even if one were to agree with the First Circuit's new law that Rule 4003(b) is nugatory along with 11 USC 522(l) except in limited undefined circumstances based on dynamic transitional and subjective terms like "facially valid" exemption claims (those not facially valid require a Rule 4003(b) objection, those that are facially valid do not require a Rule 4003(b) objection), it remains indeterminate as to what exempt claims are afforded 11 USC 522(l) protection when a party in interest fails to make a Rule 4003(b) objection. The acute need for finality and certainty in bankruptcy administration[6] has been depredated by the First Circuit while ambiguity and uncertainty prevails as to if a red flag is needed and, if so, what constitutes a proper red flag or facially valid exemption claim. Without this Court's review of *Mercer v. Monzack,* equitable and orderly administration of bankruptcy henceforth is an impossibility.

Respectfully submitted,

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[5] *Taylor v. Freeland & Kronz*, 938 F.2d 420, 424 (3rd Cir. 1991, affrm'd. S.Ct.)

[6] *Id.*, 425.